IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

APPEAL NO.860 OF 2003

Ramija Ayyub Bagwan]
Aged 25 yrs. Occ: Housewife]
residing at Bagwan Nagar,]
Mulegaon Road, Solapur]
(presently lodged at Yerwada]
Central Prison, Pune.]]..Appellant
[Ori.Accused No.5]

Vs.

The State of Maharashtra]..Respondents

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Mr.A.P.Mundargi, Sr.Advocate with Mr.P.R. Arjunwadkar Advocate for the Appellant
Mr.M.S.Mhambre APP for State

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WITH

APPEAL NO.1338 OF 2003

1. Yunnus Rahimbaksha Bagwan] @ Durugkar, Age 24,Occ:] Mechanic]
2. Ayyub Rahimbaksha Bagwan] Aged 29 yrs. Occ:Service] residing at Bagwan Nagar] Mulegaon Road, Solapur] [presently lodged at] Yerwada Central Prison,] Pune.]]..Appellants
[Ori.Accused Nos. 1 and 2]

Vs.

The State of Maharashtra]..Respondents

...

Mr.A.P.Mundargi, Sr.Advocate with Mr.P.R. Arjunwadkar Advocate for the Appellants
Mr.M.S.Mhambre APP for State

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**CORAM: R.M.S.KHANDEPARKAR, AND
SMT.V.K.TAHILRAMANI, JJ.**

DATE : SEPTEMBER 06, 2007

ORAL JUDGMENT [PER SMT.V.K.TAHILRAMANI, J.]:

1. By Criminal Appeal No. 860 of 2003, the appellant-Ramija Ayyub Bagwan (original accused No.5 in Sessions Case No.252 of 2002), and by Criminal Appeal No. 1338 of 2003, the appellant No.1-Yunnus Rahimbaksha Bagwan @ Durugkar and appellant No.2-Ayyub Rahimbaksha Bagwan (original accused Nos.1 and 2 in Sessions Case No.252 of 2002), have challenged the judgment and order dated 9th May, 2003 passed by the learned IVth Additional Sessions Judge, Solapur. By the said judgment and order, all the three appellants were convicted for the offence punishable under Section 302 r.w. 34 of IPC and sentenced to R.I. for life and fine of Rs.500/- each. They are also convicted for the offence punishable under Section 498-A r.w. 34 of IPC and sentenced to R.I. for one year and to pay a fine of Rs.500/- each. Both the sentences were directed to run concurrently. However, the learned Judge has acquitted all the three appellants of the

charge under Section 304-B r.w. 34 of IPC. It may be stated here that the original accused Nos.3,4 and 6 were acquitted of all the charges levelled against them.

2. The prosecution case briefly stated, is as under:

. The deceased Rihana was married to original accused no.1 Yunnus Rahimbaksha Bagwan. Their marriage took place on 19th May, 2002. Appellant-Ayyub Bagwan is the brother of accused no.1 Yunnus Bagwan. Appellant Ramija is the wife of Ayyub. The appellants and deceased Rihana were all residing together. It is the prosecution case that demand of Rs.50,000/- was made by the accused persons from Rihana and her parents for running garage. As the demand was not met, the accused persons abused and beat Rihana and on 23rd September, 2002 at 7 a.m. the accused caught hold of Rihana, poured kerosene on her and set her on fire. Rihana sustained 93% burn injuries. Her dying declarations (Exhibits 31 and 46) came to be recorded in the Hospital. Thereafter, Rihana died on 27th September, 2002. After completion of

investigation, charge sheet came to be filed. In due course, the case was committed to the Court of Sessions for trial.

3. Charge under Sections 498-A, 302 r.w. Section 34 of IPC came to be framed against the appellants and three other accused persons including accused Rahimbaksha and accused Noorjanha who are the father-in-law and mother-in-law of deceased Rihana respectively. Alternatively, charge under Section 304-B r.w. 34 of IPC came to be framed against all the accused persons. All the accused pleaded not guilty to the said charges and claimed to be tried. The defence of the accused is that of total denial and false implication. After going through the evidence adduced by the prosecution, the learned Sessions Judge convicted the appellants as stated in paragraph 1 above. Hence, this appeal.

4. We have heard Mr.A.P.Mundargi, learned Senior Advocate for the appellants and Mr.Mhambre, the learned APP for the State. We have also perused the judgment and order passed by the learned Addl. Sessions Judge, as well as record pertaining to the present case. After carefully considering the

evidence on record, we are of the opinion that both these appeals deserve to be allowed.

5. As far as the involvement of appellants is concerned, even as per the prosecution case, the only material against them is two dying declarations (Exhibits 31 and 46). It may be stated here that all the material and relevant witnesses including the relatives of the deceased P.W.3 Khairunissa, mother of deceased Rihana and P.W.4 Ruksana, sister of deceased Rihana, have turned hostile. Thus, it is seen that the case is solely dependent on the two dying declarations. The first dying declaration (Exhibit 31) was recorded by P.W.9 Special Judicial Magistrate Mr.Mane. The said dying declaration was recorded on 23rd September, 2002 at 11.40 a.m. The second dying declaration was recorded by P.W.10 P.S.I. Garad on 23rd September, 2002 at 12.15 p.m. As far as these two dying declarations are concerned, we have noticed that there are major discrepancies in the two dying declarations. In the dying declaration (Exh.31), Rihana has stated that at 7 a.m. her brother in law Ayyub, her husband Yunnus and her Jethani Rehmu caught her and poured

kerosene on her and thereafter, Rehmu set her on fire. She has stated that the quarrel took place because her husband was asking to get Rs.50000/- from her parents to set up a garage. However, in the second dying declaration (Exh.46) she has stated that at 7 a.m. Rammu raised quarrel with her stating that she could not do the household work properly. At that time, her brother in law and husband Yunnus came there. They caught hold of her and thereafter Rammu poured kerosene on her person and her sister in law Rehana (original accused no.6) set her on fire with the help of match stick. Thus, in the dying declaration (Exh.46) the role of pouring kerosene is attributed solely to Rammu and act of setting her on fire is attributed to the sister in law (Rehana Gilani) of the deceased Rihana whereas in the dying declaration (Exh.31), she has stated that Ayyub, Yunnus and Rehana poured kerosene on her person and Rehana set her on fire. This dying declaration is totally silent in respect of her sister in law Rehana. Thus, in respect of role attributed to the accused persons, there is major discrepancy in both the dying declarations. Moreover, in the dying declaration Exh.46, mention is made of one "Rammu"

whereas in the dying declaration Exh.31 mention is made of one "Rehmu". There is no material to show that "Rammu" and "Rehmu" is one and the same person.

6. Mr.Mundargi has submitted that both the dying declarations are not free from doubt. From the evidence of P.W.11 Satish Tak, it is seen that Special Judicial Magistrate P.W.9 Mr.Mane has recorded the dying declaration (Exh.31) without getting the patient Rihana examined from the Doctor to ascertain whether she was in a fit state to give her statement. Dr.Tak has clearly stated that the Magistrate came to the hospital and met him. The Special Judicial Magistrate informed him that he was to record the dying declaration of Rihana. He went along with the Magistrate to the burn ward and Magistrate started recording dying declaration of the patient. Thereafter, he (Dr.Tak) made an endorsement **after** completion of the statement that the patient was conscious and in a position to give a statement. Thus, it is seen that prior to recording of dying declaration, the Doctor had not examined the patient and ascertained whether she

was in a fit state to give her statement. It is also pertinent to note that the Doctor except for saying that he gave endorsement on the dying declaration, does not remember any of the details of what happened on that day. The Doctor has clearly stated that he was unable to state the MLC number of the patient, the Doctor who attended the patient, for how long the patient was in the casualty ward. He has also stated that he had gone through the medical papers but he does not know the contents thereof. Thus, except for the Doctor stating that he gave endorsement, the Doctor was unable to give any answer in relation to the patient and her treatment. As observed earlier by us, the endorsement of the Doctor on the dying declaration recorded by the Special Judicial Magistrate Mr.Mane has been taken after the dying declaration was recorded. Looking to all these aspects, we do not find it safe to rely on this dying declaration.

7. As far as dying declaration (Exh.31) recorded by Special Judicial Magistrate Mr.Mane is concerned, he has stated that he recorded the dying declaration in two copies. He put one copy in an

envelop and sealed it in the hospital itself. One copy of the dying declaration remained with him. He could not trace out the second copy which was with him. Hence, he brought to the Court a xerox copy. It is his case that he obtained xerox copy of the dying declaration from his second copy which was the carbon copy. However, he does not remember the date when he obtained the xerox. It is not understood as to what was the reason for him for obtaining xerox copy from the carbon copy and as to what were the circumstances that prompted P.W.9 Mane to take out xerox copy from the carbon copy of the dying declaration. It is only the xerox copy which is before the Court and the carbon copy has not been brought before the Court. This raises doubt about this dying declaration. Moreover, requisition letter (Exhibit-30) was given to Special Judicial Magistrate to record the dying declaration. In the said letter, it is clearly mentioned that the patient had committed suicide. This also raises further doubt in our mind about the dying declarations.

8. As far as the other dying declaration (Exh.46) which was recorded by P.W.10 P.S.I. Garad is

concerned, he has stated that the dying declaration is not in his handwriting. However, he has not stated who has recorded the dying declaration and why it was recorded by somebody else. Moreover, as observed earlier by us, there is material discrepancy between both the dying declarations. Taking into account, the cumulative effect of the discrepancies and lacunae in both the dying declarations, we do not find it safe to rely on the said dying declarations. Besides the dying declarations, there is no other material against the appellants. In such case, the appellants deserve to be given benefit of doubt. In this view of the matter, the appellants deserve to be acquitted.

9. Appeal is therefore, allowed. Judgment and Order dated 9.5.2003 delivered by IVth Additional Sessions Judge, Solapur in Sessions Case Nos.252 of 2002 thereby convicting appellants for the offence punishable under Sections 302, 498-A r.w. 34 of IPC is quashed and set aside. The appellants are acquitted of the said charges. Appellant in Appeal No.860 of 2003 is on bail. Her bail bonds shall stand cancelled. The appellants in Criminal Appeal

No.1338 of 2003, who are in jail, shall be released forthwith if not required in any other case. Fine amount if paid, shall be refunded to the appellants.

[R.M.S.KHANDEPARKAR, J.]

[SMT.V.K.TAHILRAMANI,J.]